

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:10-CR-35-FL
No. 5:12-CV-98-FL

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| KWAME SMITH, |) | |
| |) | |
| Petitioner, |) | |
| v. |) | NOTICE OF WITHDRAWAL OF UNITED |
| |) | STATES' MOTION TO DISMISS [DE 42] AND |
| UNITED STATES OF AMERICA, |) | SUPPLEMENTAL RESPONSE |
| |) | |
| Respondent. |) | |

The United States hereby withdraws its previously filed motion to dismiss [DE 42] and submits this supplemental response to Kwame Smith's petition for relief under 28 U.S.C. § 2255:

The government previously moved to dismiss the petition on two grounds: first, that Smith had waived the right to seek post-conviction relief in his plea agreement, and second, that the petition was barred by the statute of limitations.

The government has reconsidered its position in cases such as this, where the defendant was erroneously convicted of being a felon in possession of a firearm based on a prior conviction that, in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011 (en banc)), is not punishable by more than one year imprisonment. The government has determined that, in this narrow category of cases, in the interests of justice, it will waive its defenses based on the plea agreement waiver and the statute of limitations.

A court may not override the government's deliberate waiver of a statute of limitations defense. *See Day v. McDonough*, 547 U.S. 198, 209 (2006) ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense"); *Wood v. Milyard*, 132 S. Ct. 1826 (2012) (holding that appellate court abused its discretion by addressing the timeliness

of a habeas petition where the State had made a deliberate decision not to enforce the statute of limitations). Nor is it appropriate for a court to enforce a plea agreement waiver where the government has chosen not to enforce it. *See United States v. Jones*, 667 F.3d 477, 486 (4th Cir. 2012).

Accordingly, the Court should reach the merits of the petition, vacate Smith's conviction on Count One, and reinstate Count Two¹ for further proceedings. *See United States v. Maybeck*, 23 F.3d 888, 894 (4th Cir. 1994) (where the government has "relinquished the opportunity to prosecute [the defendant] on other counts when the plea agreement was negotiated," the appropriate remedy when granting § 2255 relief is to "return[] the parties as nearly as possible to their pre-plea agreement positions.").

Respectfully submitted this 13th day of August, 2012.

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¹ Count Two charges Smith with possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. §§ 5861(d) and 5871. This count is unaffected by the Fourth Circuit's decision in *Simmons*. The Double Jeopardy Clause also has no impact on Count Two, since "[a] jury was never impanelled to try [this] count[]; the court never received evidence on [this] count[]; [the defendant] was never acquitted of [this] count[]; and [the defendant] was never sentenced for [this] count[]." *United States v. Greene*, 139 F.3d 1002, 1004-05 (4th Cir. 1998).

CERTIFICATE OF SERVICE

I certify that on August 13, 2012, I caused a copy of the foregoing to be served by electronic filing on Petitioner's counsel of record, Halerie Mahan.

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